Washington Beef, Inc. and United Food and Commercial Workers Union, Local 1439, AFL-CIO. Case 19-CA-24738

October 18, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

Pursuant to a charge filed on August 22, 1996, the General Counsel of the National Labor Relations Board issued a complaint on August 27, 1996, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 19–RC–13065. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); Frontier Hotel, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On September 16, 1996, the General Counsel filed a Motion to Transfer Case to Board and for Summary Judgment. On September 18, 1996, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On October 9, 1996, the Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer and/or response the Respondent admits its refusal to bargain with the Union, but attacks the validity of the Union's certification on the basis of its objections to the election in the representation proceeding. In addition, the Respondent in its answer asserts various affirmative defenses to the complaint, including that the complaint allegations are barred by Section 10(b) of the Act because they are not encompassed within the charge, and that the Union has waived its right to bargain over any and all alleged changes.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

We also find that no issue warranting a hearing is raised by the various affirmative defenses contained in the Respondent's answer. The Respondent's affirmative 10(b) defense is clearly without merit and frivolous. The Union's August 22, 1996 charge, a copy of which is attached to the General Counsel's motion. specifically alleges that the Respondent has violated Section 8(a)(5) and (1) of the Act since at least April 30, 1996, the date of the Union's certification, by failing to recognize and bargain with the Union. The complaint allegations are precisely the same, and are therefore clearly encompassed within the charge. As for the Respondent's additional affirmative defense that the Union has "waived" bargaining over "any and all alleged changes," the complaint does not allege any changes and thus this defense makes no sense. Further, to the extent Respondent may be asserting that the Union has waived its right to recognition and bargaining, this is clearly belied by the Union's August 22 unfair labor practice charge, which as indicated above was filed within 4 months of the April 30 certification and alleged refusal to recognize and bargain and therefore well within the 10(b) period. Finally, we note that the Respondent has not reasserted the foregoing affirmative defenses in its response to the Notice to Show Cause.

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a State of Washington corporation with an office and place of business in Toppenish, Washington, where it is engaged in business as a meat processing plant. The Respondent, during the 12-month period preceding issuance of the complaint, which period is representative of all material times, in the course and conduct of its business operations, had gross sales of goods and services valued at in excess of \$500,000. During the same period, the Respondent sold and shipped goods or provided services from its facilities within the State of Washington, to customers outside the State, or sold and shipped goods or provided services to customers within the State, which

¹ See Adams Mfg. Co., 321 NLRB 922 fn. 1 (1996). Moreover, we note that the Respondent in its answer admits that it received an information request from the Union dated May 21, 1996, and that it also received letters from the Union dated June 12 and July 26, 1996. Although these letters are not included in the record, it is well established that a request for information constitutes a request for recognition and bargaining. See Biewer Wisconsin Sawmill, 306 NLRB 732 fn. 4 (1992), and cases cited there. Further, by filing the August 22 charge alleging an unlawful refusal to recognize and bargain, the Union clearly reaffirmed its prior request(s) for recognition and bargaining. See Williams Enterprises, 312 NLRB 937, 938–939 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995).

customers were themselves engaged in interstate commerce by other than indirect means, of a total value of in excess of \$50,000.

The Respondent, during the same period, which period is representative of all material times, in the course and conduct of its business operations, purchased and caused to be transferred and delivered to its facilities within the State of Washington goods and materials valued at in excess of \$50,000 directly from sources outside the State, or from suppliers within the State which in turn obtained such goods and materials directly from sources outside the state.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held August 25, 1995, the Union was certified on April 30, 1996, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees, leadpersons, office janitors, panel operators, load controllers, scalers, storeroom employees, and truck drivers employed by Washington Beef, Inc. at its Toppenish, Washington facility; excluding all office clerical employees, professional employees, cattle buyers, nurse therapists, independent contractors and their employees, quality control employees, beef graders, guards and supervisors as defined by the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since April 30, 1996, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive bargaining representative of the unit. We find that this refusal constitutes an unlawful failure and refusal to recognize and bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since April 30, 1996, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. Mar-Jac Poultry Co., 136 NLRB 785 (1962); Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); Burnett Construction Co., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Washington Beef, Inc, Toppenish, Washington, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Refusing to bargain with United Food and Commercial Workers Union, Local 1439, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time production and maintenance employees, leadpersons, office janitors, panel operators, load controllers, scalers, storeroom employees, and truck drivers employed by Washington Beef, Inc. at its Toppenish, Washington facility; excluding all office clerical employees, professional employees, cattle buyers, nurse therapists, independent contractors and their employees, quality control employees, beef graders, guards and supervisors as defined by the Act.

(b) Within 14 days after service by the Region, post at its facility in Toppenish, Washington, copies of the attached notice marked "Appendix." Copies of the

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Continued

notice, on forms provided by the Regional Director for Region 19 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 22, 1996.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Food and Commercial Workers Union, Local 1439, AFL—CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time production and maintenance employees, leadpersons, office janitors, panel operators, load controllers, scalers, storeroom employees, and truck drivers employed by us at our Toppenish, Washington facility; excluding all office clerical employees, professional employees, cattle buyers, nurse therapists, independent contractors and their employees, quality control employees, beef graders, guards and supervisors as defined by the Act.

WASHINGTON BEEF, INC.